UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

STEIN, INC.

and

TRUCK DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 100, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS **Case 09–CA–214633**

INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE) LOCAL 18 (Stein, Inc.)

and

Case 09–CB–214595

TRUCK DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 100, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Daniel Goode and Theresa Laite, Esqs.,
for the General Counsel.
Keith Pryatel, Esq.,
for Respondent Stein, Inc.
Tim Fadel, Esq.,
for Respondent International Union of Operating Engineers (IUOE) Local 18.
Stephanie Spanja, Esq.,
for Charging Party Truck Drivers, Chauffeurs and Helpers Local Union No. 100.

DECISION

I. INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. These consolidated cases were tried on September 12, 13, and 17, and October 22 and 23, 2018,[2] in Cincinnati, Ohio, based on allegations by the Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters ("Teamsters Local 100" or "Local 100") that Stein, Inc. and the International Union of Operating Engineers (IUOE) Local 18 ("IUOE Local 18" or "Local 18")(collectively "Respondents") violated the National Labor Relations Act ("the Act"). The alleged violations began when Stein, a successor employer, unilaterally merged the predecessor's three existing bargaining units into one unit and then recognized and entered into a collective-bargaining agreement with IUOE Local 18

[1] Abbreviations are as follows: "Tr." for transcript; "Jt. Exh." for Joint Exhibits; "GC Exh." for General Counsel's Exhibit; "Stein Exhs." for Stein's Exhibits; "Local 18 Exhs." for IUOE Local 18's Exhibits.
[2] All dates are to 2018, unless otherwise stated.

as the exclusive bargaining representative of that merged unit, at a time when Teamsters Local 100 continued to represent a majority of the employees in one of the three units.

The critical facts are largely undisputed. In 2017, Stein bid to replace TMS International, Inc. ("TMS") as the contractor performing the scrap reclamation, slag removal, and processing of slag ("slag/scrap work") for AK Steel at its Middletown, Ohio location. For over 20 years, TMS, and its predecessors, performing this slag/scrap work utilized three bargaining units, individually represented by IUOE Local 18, Teamsters Local 100, and the Laborers' International Union of North America, Local No. 534 ("Laborers Local 534").[3] Although Stein was aware of the existing bargaining relationships, it was intent on having only one unit, represented by one union. To that end, in August 2017, Stein contacted IUOE Local 18 about entering into an agreement that would combine the three units into one, with Local 18 as the sole representative of that merged unit. Stein selected Local 18 because it represented a majority of the TMS employees performing the slag/scrap work. IUOE Local 18 agreed, and on October 12, 2017, Stein recognized Local 18 as the representative of the merged unit. Stein did not contact Teamsters Local 100 or Laborers Local 534, even though there was no evidence of loss of majority support among those in their respective units. On November 9, 2017, Stein met with TMS employees at the Middletown location to inform them that it would be assuming the contract for the slag/scrap work, and that if employees wanted to work for Stein they would need to go through the application process. Stein advised that those hired would be working under different terms and conditions of employment, and that *all jobs will be under IUOE Local 18.* Respondents executed their collective-bargaining agreement covering the merged unit on December 22, 2017, prior to hiring any employees. On January 1, Stein commenced operations, and by January 6, it had hired and employed a "substantial and representative complement" of employees. A majority of those employees were former TMS employees, including 9 of the 15 drivers represented by Teamsters Local 100. Since January 1, Respondents have maintained and enforced the terms of their agreement, including the union-security and dues-checkoff provisions. Those terms differ from the terms in effect for the drivers when they worked for TMS prior to January 1. On January 10, Teamsters Local 100 sent Stein a letter demanding recognition/requesting bargaining as the exclusive bargaining representative of the drivers units. Stein has failed or refused to recognize and bargain with Local 100.

The amended consolidated complaint alleges that Stein, as a successor employer, violated Section 8(a)(1), (2), (3), and (5) of the Act by the above conduct, and violated Section 8(a)(1) and (2) of the Act when it rendered unlawful assistance to IUOE Local 18, and threatened employees, to get them to join and pay dues and fees to IUOE Local 18—all at a time when IUOE Local 18 did not represent an unassisted and uncoerced majority of the employees in the drivers unit. The amended consolidated complaint also alleges that IUOE Local 18 violated Section 8(b)(1)(A) and (b)(2) of the Act by its role in the above conduct, and by threatening employees to get them to join and pay dues and fees to Local 18. For the reasons stated below, I find merit to the alleged violations.

II. STATEMENT OF THE CASE

On February 8, Teamsters Local 100 filed an unfair labor practice charge against Stein in Case 09-CA-214633. That same day, Teamsters Local 100 filed an unfair labor practice charge against IUOE Local 18 in Case 09-CB-214595. Local 100 amended both charges on March 26. On April 19, the Regional Director for Region 9 of the National Labor Relations Board (the Board), on behalf of the General Counsel, issued an order consolidating cases and consolidated complaint and notice of calendar call in these cases, and on April 30, issued an amendment to that order consolidating cases and consolidated complaint. These

[3] These consolidated cases were tried together with the amended consolidated complaint issued based on charges Laborers' Local 534 filed against Stein and IUOE Local 18 in Cases 09–CA–215131, 09–CA–219834, and 09–CB–215147, respectively, alleging similar violations. Those allegations will be addressed in a separate decision.

documents will be referred to, collectively, as the amended consolidated complaint. On May 3, Stein filed its answer to the amended consolidated complaint. On May 17, IUOE Local 18 filed its answer to the amended consolidated complaint. On July 12, the IUOE amended its answer.[4]

At the hearing, all parties were afforded the right to call and examine witnesses, present relevant documentary evidence, and argue their respective legal positions orally. Stein, IUOE Local 18, and the General Counsel filed timely posthearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the posthearing briefs and my observations of the credibility of the witnesses, I make the following findings, conclusions of law, and remedy and recommended order.

III. FINDINGS OF FACT[5]

A. Jurisdiction, Labor Organizations, and Agents

Stein is a corporation with a principal office in Broadview Heights, Ohio, that has been engaged in slag processing and steel mill services at various locations throughout the United States, including the slag/scrap work at the AK Steel Middletown facility in Middletown, Ohio. In conducting its operations during the 12-month period ending April 15, Stein will annually perform services valued in excess of $50,000 outside the State of Ohio. Based on a projection of its operations since about January 1, at which time Stein commenced its operations at its Middletown, Ohio facility, it will annually sell and ship from its Middletown, Ohio facility goods valued in excess of $50,000 directly to points outside the State of Ohio. Stein admits, and I find, it is and has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is further admitted, and I find, that, at all material times, Teamsters Local 100, Laborers Local 534, and IUOE Local 18 have been labor organizations within the meaning of Section 2(5) of the Act.

The following individuals are admitted supervisors and agents of Stein within the meaning of Section 2(11) and (13) of the Act, respectively: Dave Holvey (vice president/chief financial officer), Bill Forman (vice president of operations), Douglas Huffnagel (area manager), Jeff Porter (site superintendent), and Jason Westover (shift supervisor). The following are admitted agents of IUOE Local 18 within the

[4] On July 9, the General Counsel filed a motion in limine to preclude Respondents from presenting evidence at the hearing in support of Respondents' respective affirmative defenses related to whether the relationships between TMS and Teamsters Local 100 and Laborers Local 534, respectively, were governed by Section 8(f) of the Act, claiming such evidence was irrelevant to the issues raised in the amended consolidated complaints. Stein opposed the motion. At the hearing, I denied the motion and allowed Respondents to present relevant evidence related to the nature of the individual bargaining relationships between TMS, and its predecessors, and the three unions at issue.

[5] Although I have included record citations to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record. The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as having been in conflict with credited testimony or other evidence, or because it was otherwise incredible and unworthy of belief. In assessing credibility, I have relied primarily on witness demeanor. I also have considered factors such as: the context of the witness' testimony, the quality of the witness's recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951)).

meaning Section 2(13) of the Act: Jefferson S. Powell (district manager), Richard E. Dalton (business manager), Thomas P. Byers (president), and Justin Gabbard (business agent).

B. Unfair Labor Practices

1. *Background*

AK Steel Holding Corporation ("AK Steel") is a steel making company headquartered in Westchester Township, Butler County, Ohio. The steel making plant at issue is located on an 1100-acre parcel of land in Middletown, Ohio. The Middletown location includes, among others, a blast furnace, a basic oxygen furnace, a processing plant, a kisch plant, a mechanic shop, and various offices.

The dispute at issue is limited to the slag/scrap work performed at the AK Steel Middletown location. Slag is a by-product of the steel making process. It is produced when the impurities separate from the molten steel in the furnaces. Slag begins as a molten liquid melt that solidifies upon cooling. Once cooled, the slag is processed and often sold as an aggregate or base for roads and highways.

For decades, AK Steel has contracted out the slag/scrap work performed at its Middletown location through a competitive bidding process. AK Steel has contracted with McGraw Construction Co., then International Mill Services, Inc., and then Tube City Inc. d/b/a Olympic Mill Service. Tube City and International Mill Services later merged and continued to perform the slag/scrap work at issue under various corporate names, including Tube City LLC d/b/a IMS Division Tube City IMS, Tube City LLC, Tube City IMS, LLC, and, most recently, TMS. (Tr. 771–772) (Local 18 Exh. 2).[6]

Over the years, the procedure for removing and processing slag has largely remained the same. The liquid slag is removed from the furnace and placed into hot pits, where it is cooled. Once cooled, front loaders dig up and load the slag onto off-road dump trucks. The trucks transport the slag over to the south side of the property where it is unloaded. A crane with a large magnet is run over the slag to extract any scrap metal that is then recycled. The slag material is run through the processing plant which has large hoppers, shakers, and screens that separate the slag by size. The processed slag is then loaded onto a dump truck, transported to the stockpiles, and dumped into specific piles by type and size. Scrap reclamation includes extracting pieces of metal from the slag and cutting large pieces of metal into smaller sizes, and then reselling that metal back to AK Steel.

TMS and its predecessors performed this slag/scrap work utilizing three units: operators, drivers, and laborers. Each unit performed discrete tasks within its jurisdiction, and each unit was represented for purposes of collective bargaining by its respective union. Teamsters Local 100 represents the drivers. The drivers operate the large (35-ton to 60-ton) off-road dump trucks used to transport the slag from the furnaces to the area of the property where the slag/scrap work is performed and then haul the processed slag for storage. They also spray the dirt roads on the jobsite using a water truck to keep the dust down in accordance with environmental regulations. They also leave the jobsite to purchase parts or supplies from area stores using a company pickup truck. Laborers Local 534 represents the laborers. The laborers primarily handle safety, fire watch, manual cleaning, lancing/torching, and knockouts. Lancing/torching are the processes used used to cut large pieces of metal into smaller, more manageable pieces. Knockout is the removing of slag remnants from large pots or cauldrons. IUOE Local 18 represents the operators. The operators run all

[6] From December 2004 through December 2007, Tube City, LLC and International Mill Service, Inc. operated as separate wholly owned "sister" subsidiaries of Tube City IMS Corporation. Effective January 1, 2008, Tube City, LLC and International Mill Service, Inc. merged and became Tube City IMS, LLC. Tube City IMS, LLC continued to operate under the trade names of Tube City Division, Tube City IMS, and IMS Division, Tube City IMS. (Local 18 Exh. 2). In around 2010, the company went public and became known as TMS. (Tr. 772).

the heavy equipment (e.g., front-end loaders, road graders, forklifts, backhoes, bobcats/skid steers, fuel trucks, cranes, portable plants, scrap handlers, telehandlers, etc.); everything except for the dump trucks and water trucks. The operators also include mechanics that maintain and service all the vehicles and equipment.

The three separate units historically worked alongside one another performing their defined tasks. For instance, at the blast furnace, the operator runs the front loaders to dig up the cooled slag from the pits and load it onto the large off-road dump trucks operated by the drivers. The laborers are present to handle safety and fire watch, and help coordinate the staging of vehicles and equipment. The three units communicate through two-way radios.

The three units also attend the same daily briefings and monthly safety meetings, and they use the same lunchroom, shower facilities, locker room, and parking lot.

2. *Recognition of Teamsters Local 100, Laborers Local 534, and IUOE Local 18*

For decades, TMS and its predecessors separately recognized and bargained with Teamsters Local 100, Laborers Local 534, and IUOE Local 18. Each union has maintained successive individual collective-bargaining agreements with these contractors, setting forth the wages, hours, and other terms and conditions of employment covering those employees in their respective bargaining units.

Laborers Local 534's most-recent agreement was with Tube City IMS, LLC, and it is dated March 1, 2013 to August 31, 2016. (Jt. Exh. 6.) In this agreement, Local 534 is recognized as "the sole and exclusive bargaining agent" for the following unit (hereinafter referred to as "laborers unit"):

> [A]ll general labor work and clean up, laborer-foreman, lancer/jack hammer man, switch cleaning, utility laborer, quality control laborer, water tenders (knock out and all pits), safety men and all equipment to perform their task [sic.], pumps (4" and smaller), and changing bags in bag houses, employees employment by [Tube City IMS, LLC] at its AK Steel, Middletown, Ohio facility, excluding all other production and maintenance employees, office clerical employees, professional employees, guards and supervisors as defined by [the Act].

(Jt. Exh. 6, p. 2).[7]

On around July 29, 2016, John Ponzuric, the director of human resources for Tube City IMS, and Jerry Bowling, business manager for Laborers Local 534, extended this agreement until midnight August 31, 2017. On July 20, 2017, Bowling and Ponzuric again extended that agreement until December 31, 2017. (Jt. Exh. 11.). (hereinafter collectively referred to as the "Laborers Local 534 collective-bargaining agreement").

Teamsters Local 100's most-recent agreement was with TMS, and it is dated April 1, 2016 to December 31, 2017. In this agreement, Local 100 is recognized as "the sole and exclusive bargaining agent" for "all truckdrivers employed by the Employer at its AK Steel, Middletown, Ohio facility, excluding all other production and maintenance employees, office clerical employees, professional employees, guards and supervisors as defined by the [Act] …" (Jt. Exh. 7, p. 1) (hereinafter referred to as "drivers unit").[8]

[7] Except for "quality control laborer," this is the same bargaining unit described in the agreement between Tube City LLC and Laborers Local 54, effective from February 28, 2010 to February 28, 2013. (Jt. Exh. 2.)

[8] This is the same unit described in the April 1, 2010 to March 31, 2013 agreement and the April 1, 2013 to March 31, 2016 agreement between Tube City IMS, LLC and Teamsters Local 100. (Jt. Exhs. 3 and 4.)

IUOE Local 18's most-recent agreement (pre Stein) was with Tube City IMS, LLC, and it is dated October 1, 2015 to September 30, 2018. In this agreement, Local 18 is recognized as "the sole and exclusive bargaining agent" for "all heavy equipment operators, mechanics/maintenance operators, lube/service operators, plant/conveyor operators, and helpers employed by the Company at its A-K Steel, Middletown, Ohio facility excluding all other production and maintenance employees, office clerical employees, professional employees, guards and supervisors as defined by the [Act]."[9] (Jt. Exh. 8, p. 1) (hereinafter referred to as "operators unit").[10]

There is no dispute that TMS continued to recognize Laborers Local 534, Teamsters Local 100, and IUOE Local 18 and applied the terms and conditions of the applicable collective-bargaining agreement to the applicable unit, until it ceased performing the slag/scrap work at the Middletown location.

3. *Stein Bids to Replace TMS and Initiates Contact with IUOE Local 18*

In 2017, AK Steel opened up for competitive bidding the contract, which would be effective January 1, for the slag/scrap work at the Middletown location. Stein and TMS are competitors in their industry, and both submitted bids to perform the work. In August 2017, Stein's vice president/chief financial officer, Dave Holvey, learned that Stein was the leading bidder for the contract. It was Stein's intention that, if it was awarded the contract, it would perform the work using one bargaining unit, represented by one union. (Tr. 186). To that end, in late August 2017, Holvey contacted IUOE Local 18 about meeting to begin negotiating an agreement. Holvey testified he selected IUOE Local 18 because, according to a TMS employee roster, Local 18 represented a majority of the total employees performing the slag/scrap work at the AK Steel Middletown location. (Tr. 189.)[11] At the time, Holvey was aware Teamsters Local 100 represented TMS's drivers and Laborers Local 534 represented TMS's laborers. Despite this knowledge, Stein made no effort to contact either union. (Tr. 185-186.)

On August 22, 2017, representatives from Stein and IUOE Local 18 met to discuss negotiating a new collective-bargaining agreement. (Tr. 189) (GC Exh. 4.) The parties continued to meet to negotiate over the following weeks. Holvey was Stein's chief negotiator for these meetings. (Tr. 190.) The record does not address the specifics surrounding the parties' negotiations, but on October 12, 2017, Holvey emailed IUOE Local 18 business representative Jeff Powell a draft collective-bargaining agreement for him to review for their upcoming meeting. The agreement recognized Local 18 as the bargaining representative for the combined unit of drivers, laborers, and operators. (GC Exh. 5.) At the time Holvey sent this agreement, Local 18 had not presented Stein with any authorization cards. (Tr. 192.) On October 23, 2017, Holvey sent Powell an email with a revised copy of the proposed agreement, which contained their agreed-upon changes. (GC Exh. 6.) In that email, Holvey asked that Local 18 put together a communication sheet to give to those contemplating the move to the Operating Engineers, because there were several employees trying to understand the pension-retirement and health plan differences from those offered by the Laborers and Teamsters. Four days later, Holvey emailed Powell with a copy of the agreement, stating: "We would like to put the agreement behind us and start planning to convert some of the guys to the Operating

[9] This is the same unit described in the December 1, 2012 to October 1, 2015 agreement between Tube City IMS, LLC and IUOE Local 18. (Jt. Exh. 5.)

[10] In 1999, after Tube City, Inc. d/b/a Olympic Mill Service ("OMS") acquired the contract to perform the slag/scrap work at the Middletown location, IUOE Local 18 requested voluntary recognition from OMS, and later presented OMS with authorization cards from a majority of the operators. (Tr. 693-694.) OMS thereafter recognized Local 18 as the bargaining representative for all full-time heavy equipment operators, non-licensed motorized equipment operators, mechanics/maintenance operators, lube/service operators and plant/conveyor operators employment by OMS at the AK Steel Middletown, Ohio facility; excluding all other production and maintenance employees, office clerical employees, professional employees, guards, and supervisors as defined by the Act. (Local 18 Exh. 1.)

[11] IUOE Local 18 represented 42 of TMS's 71 employees. (Jt. Exh. 1.)

Engineers." (GC Exh. 6.) This was sent months before Stein assumed the AK Steel contract, and months before it had hired a single employee to perform this slag/scrap work.

At some point, AK Steel officially awarded Stein the slag/scrap contract, effective January 1. On October 27, 2017, John Ponzuric of TMS notified Laborers Local 534 that TMS would not be bargaining with Local 534 for a successor agreement because TMS would no longer be performing the slag/scrap work as of midnight December 31, 2017. (Jt. Exhs. 1 and 12.) On October 30, 2017, TMS sent written notification to all TMS employees, Teamsters Local 100, Laborers Local 534, and IUOE Local 18, which stated that TMS was "shutting down its operations at the AK Steel Middletown facility" and that "[a]ll employees at the facility will be impacted and this closing is expected to be permanent."

At around this time, Stein began purchasing all of TMS's processing plants, buildings, trailers, furniture, fixtures, equipment (except computers), trucks, skid steer, loader, crane, etc. at the AK Steel Middletown location. (Tr. 218-219) (Jt. Exhs. 20-22.) Also, Stein's area manager, Doug Huffnagel, began working onsite at the Middletown location, observing TMS' operations and its employees.

4. *Employee Meetings*

On November 9, 2017, Huffnagel held meetings with all the TMS employees performing the slag/scrap work to discuss employment with Stein. Huffnagel read from the following document:

Middletown Operations

- Start date/hire date-January 1, 2018
- All jobs will be under the Operating Engineers Local 18 Union
- It is Stein, Inc.'s goal to hire as many TMS employees as possible who remain in good standing with TMS through January 1, 2018
- Classification and Rates

Group	Job description	1/1/2018
1	General Laborer	$ 15.00
	Mechanic Helper	$ 17.50
	Lancer	$ 21.93
	Lube man	$ 20.45
	Site Laborer/Safety	$ 20.93
2	Truck Driver	$ 21.12
3	General Operator	$ 24.63
	Crane Operator	$ 24.63
	B Mechanic	$ 24.63
4	A Mechanic	$ 25.00
	Hot Pit Operator	$ 26.13
	Master Mechanic	$ 26.25

- The following holidays will be observed:

  New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving day, day after Thanksgiving, & Christmas day

- All questions regarding pension and health & welfare benefit should be directed to the Operating Engineers union

- Seniority for matters including job bids, layoffs and overtime preference only will be determined on the date you were hired by TMS regardless of trade. To retain your seniority position you must commit to employment with Stein by November 20th

- All prospective employees will be subject to a 90 day probationary period, a physical, and a background check

- All TMS employees at Middletown will be measured for uniforms on Wednesday, November 15th

(Jt. Exh 13.)

Huffnagel told the TMS employees that if they wanted to work for Stein, they would need to complete an employment application, sit for an in-person interview, and pass a physical examination, a drug screening test, and a background check. He also informed them there was no guarantee that they would be hired. (Tr. 143–144; 288; 364; 469; 578.)

5. *November Discussions*

On November 21, 2017, Stein's vice president/CFO Dave Holvey sent IUOE Local 18 business representative Jeff Powell another email regarding their contract negotiations. Holvey stated that he had compared the agreement sent to him against his copy, and they were in agreement. Holvey concluded his email, "Let's get this signed soon." (GC Exh. 7.) Holvey continued to follow-up by sending emails to Powell prodding him to execute the agreement. (GC Exhs. 8 and 10.) By December 22, 2017, Stein and IUOE Local 18 both had executed their collective-bargaining agreement. (G C Exh. 11.) As of that date, IUOE Local 18 still had not presented Stein with *any* authorization cards. (Tr. 206–207.)

In November 2017, James Bowling, a Teamsters Local 100 driver and union steward, met with Huffnagel to introduce himself and to ask Huffnagel for his telephone number so that Teamsters Local 100 business agent Mike Lane could call and speak with him. Huffnagel gave Bowling one of his business cards. Bowling then asked Huffnagel if "he was going to go with all crafts." Huffnagel responded that he "couldn't say at this time." (Tr. 250–251.) Later, Mike Lane called and spoke to Huffnagel. Lane asked Huffnagel if he intended to negotiate with the Teamsters and honor the contract in place. Huffnagel responded that he "didn't know why not" but added that he "didn't really handle that and someone else would get back with [Lane] on that." (Tr. 480.) Lane then asked Huffnagel if Stein will he be hiring Teamster employees that were under contract and working for TMS, and Huffnagel said he "believed so, yes." (Tr. 480.) That was the end of the conversation. No one contacted Lane following his conversation.

6. *Collective-Bargaining Agreement Between Stein and IUOE Local 18*

In Respondents' collective-bargaining agreement, which is dated January 1, 2018 through February 28, 2021, Stein recognizes Local 18 as the exclusive collective-bargaining representative for all the hourly paid employees in the following job classifications: general laborer, mechanic helper, lancer, lube man, site laborer/safety, truckdriver, general operator, B-mechanic, hot pit operator, A-mechanic, and master mechanic; excluding individuals occupying salaried, watchperson, guard, or confidential clerical positions, or supervisory positions of the foreman level, and above. (Jt. Exh. 16, pp. 1 and 4.) Many of these same classifications are listed in the contracts covering the drivers unit and the laborers unit. Respondents' agreement contains union-security and dues-checkoff provisions, which state:

> 5.01 For the duration of this Agreement, it shall be a condition of continued employment with the Company that present employees who are members of the Union, and new hires, within thirty (30) days of actual work, while working within the bargaining, unit, shall become and remain members of the Union to the extent of paying an initiation fee, and membership dues uniformly required as a condition of acquiring or retaining membership in the Union.
>
> 5.02 The Company may hire new employees from any source, and the. Union shalt accept into membership each employee covered by this Agreement who tender to the Union the periodic membership dues, and initiation fees uniformly required as a condition of acquiring or retaining membership in the Union.
>
> 5.03 Upon notification, by the Union, that a uniform administrative dues deduction has been authorized by all employees of the Company, the Company shall deduct said uniform administrative dues. The Union shall be responsible for obtaining all individually signed authorizations.
>
> …
>
> 5.06 The Company, upon written request of the Union, shall discharge any employee within seven (7) working days after receipt of such notice who fails to tender the periodic dues, and initiation fees uniformly required by the Union as a condition of acquiring or retaining membership in the Union.

(Jt. Exh. 16, p. 2.)

Stein never notified Teamsters Local 100 or Laborers Local 534 that it had merged the three units, recognized IUOE Local 18 as the representative of that unit, and/or that it entered into a contract with Local 18 altering the wages, hours, and other terms and conditions of employment applicable to the drivers unit and the laborers unit.

7. *Hiring*

TMS ceased performing the slag/scrap work for AK Steel at the Middletown location on December 31, 2017.[12] As of that date, TMS employed 15 drivers represented by Teamsters Local 100, 14 laborers represented by Laborers Local 534, and 42 operators represented by IUOE Local 18. (Jt. Exh. 1.)

In November and December 2017, Stein held job interviews with those TMS employees who applied for jobs to continue working at the Middletown location. Doug Huffnagel was present for several of the interviews. He estimated that these interviews lasted between 5 and 45 minutes each.[13]

[12] TMS performed other, unrelated work, such as green coil and scarfing work. TMS continued to perform scarfing work for AK Steel after December 31, 2017. This work was never performed by the three units at issue. (Tr. 321.)

[13] At the hearing, Huffnagel testified that while interviewing applicants he advised them that they would be cross-trained on other duties, but he did not specify what that cross-training would involve. He testified that he mentioned this to every applicant he intended to hire. (Tr. 1252–1255.) I do not credit this testimony. There is no other evidence—testimony or document—confirming that Huffnagel mentioned cross-training or the assignment of cross-jurisdictional work during the interviews. Huffnagel said he wrote a reminder on his interview notes to mention it to applicants during the interviews, but he destroyed the notes once the interviews were completed. Additionally, Huffnagel addressed the interviewing process in his prehearing affidavit. There is no mention that he discussed cross-training or the assignment of cross-jurisdictional work. Instead, his affidavit states that he told applicants that they will "do more than one thing." (Tr. 1255–1256.) I do not find that applicants—most of whom performed more than one task within their trade when they worked for TMS--would reasonably interpret that statement as advising them that they would be performing work outside their jurisdiction. Finally, I find it telling that job descriptions, cross-

The parties have stipulated that on January 1 and/or by January 6, Stein had hired and employed a "substantial and representative complement" of employees to perform the slag/scrap work at AK Steel's Middletown location. (Jt. Exh. 1.) On January 1, Stein had 38 employees. This included 34 former TMS employees, consisting of 25 from the operators unit, 6 from the drivers unit, and 3 from the laborers unit. By January 2, Stein hired 18 more, for a total of 56 employees. This included 51 former TMS employees, consisting of 36 from the operators unit, 7 from the drivers unit, and 8 from the laborers unit. By January 6, Stein hired 4 more, for a total of 60 employees. This included 56 former TMS employees, consisting of 38 from the operators unit, 10 from the drivers unit, and 12 from the laborers unit. (Jt. Exh. 1.) Therefore, as of January 2, Stein employed a majority of the TMS employees from each of the three bargaining units.

Stein also hired several of TMS' supervisors (Chadwick Bare, John Howard, David Marville, and Nathan Prince), as well as several non-TMS supervisors, including Jason Westover (general foreman) and Jeffrey Porter (site superintendent). Doug Huffnagel was Stein's area manager. (Jt. Exh. 18.)

8. *Commencement of Operations*

On January 1, Stein began performing the slag/scrap work for AK Steel at the Middletown location. Stein used the buildings, trailers, furniture, fixtures, trucks, and equipment acquired from TMS in performing this work, and it acquired some additional equipment and vehicles. Each of the former TMS employees hired to work for Stein testified that he continued to perform the same duties and tasks, using essentially the same equipment, as when employed by TMS.

As of January 1, Stein began applying the terms of Respondents' collective-bargaining agreement on all employees performing the slag/scrap work. In addition to the recognition provision and the bargaining unit description, this agreement differed in several respects from the terms and conditions in effect covering the drivers unit prior to January 1. Specifically, there is no dispute Stein altered or did not continue: weekly contributions to the Central States Southeast and Southwest Areas Pension Fund; weekly contributions to the Ohio Conference of Teamsters & Industry Health & Welfare Fund; wage rates; shift differential; overtime payments in excess of 8 hours per day; vacation pay; work schedule; call outs or unscheduled overtime outside of the regular or established shifts; seniority provisions; safety equipment and protective clothing; and definition and assignment work. (GC Exh. 1.)

9. *Requests to Bargain*

On January 10, Teamsters Local No. 100 sent Stein a letter demanding recognition and requesting bargaining as the exclusive collective-bargaining representative of the drivers unit. (Jt. Exh. 14.) After Dave Holvey learned of Local 100's letter, he contacted Stein's legal counsel. After speaking with counsel, Holvey contacted IUOE Local 18 to request that it provide authorization cards showing that Local 18 had majority support among the employees. (Tr. 208.) At some point thereafter, IUOE Local 18 business representative Jeff Powell provided Holvey with copies of signed authorization cards from a majority of the operators hired to perform the slag/scrap work at AK Steel Middletown. (Local 18 Exh. 3.) All of the signed authorization cards were dated on or before October 2017, and none were signed by employees from either the drivers unit or the laborers unit.

On around February 5, Teamsters Local 100's attorney, Matthew Crawford, spoke on the telephone with Stein's attorney, Keith Pryatel, about Local 100's demand for recognition and request for bargaining.

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training, and the assignment of cross-jurisdictional work were never mentioned during the handout or speech Huffnagel gave on November 9, 2017. (Tr. 215–216) (Jt. Exh. 13.) These meetings were held for the express purpose of notifying TMS employees about changes Stein would be implementing once it took over the slag/scrap work.

Pryatel advised Crawford that Stein would not recognize and bargain with Local 100, contending that Local 100's agreement with TMS/Tube City was an 8(f) agreement that expired on December 31, 2017. He further stated Local 18 presented Stein with authorization cards signed by a majority of the total workforce at the Middletown location authorizing Local 18 to be their bargaining representative. (Jt. Exh. 15.)

There is no dispute that Stein has failed or refused to recognize and bargain with Teamsters Local 100.

10. *Alleged Threats and Assistance*

Almost immediately after Stein commenced operations, its supervisors and managers began informing drivers and laborers that they needed to join IUOE Local 18. On January 3, Stein's supervisor, Jason Westover, was in the health and welfare office at the AK Steel Middletown location, handing out IUOE Local 18 permit packets to employees. These "permit packets" included Local 18 union authorization cards, an application for membership in the International Union of Operating Engineers, a dues-deduction authorization form, group insurance beneficiary designation form, a death benefit beneficiary designation form, and authorization forms for political, educational, and/or charitable funds. (GC Exh. 16.) Westover told the employees present that they needed to fill out the packets and turn them into IUOE Local 18. (Tr. 258–259). James Bowling, a former TMS driver represented by Teamsters Local 100 who was hired by Stein, was present.

On January 17, the International Union of Operating Engineers District 4/5 Office sent Stein's area manager, Doug Huffnagel, an email with a list of IUOE Local 18 members and/or permit holders who were not in "good standing" based on their nonpayment of union dues and who could not work pursuant to the union-security provision. There were four employees listed. All of them were former TMS operators who were hired by Stein and continued working. Huffnagel agreed to hand the letters out to the employees at issue. (Tr. 221)(GC Exhs. 13 and 14.) There is no evidence as to what, if any, further actions were taken.

In mid-January, Westover gave a Local 18 permit packet to Gary Wise, another former TMS driver represented by Teamsters Local 100 who was hired by Stein. Westover told Wise that he needed to fill out the packet and join IUOE Local 18; otherwise he would be taken off the schedule. (Tr. 534–535.) Westover gave Wise the address for the hall and told him that if he went there on a Wednesday, there would be someone there to help him with the packet. (Tr. 535.) Later that week, Wise went to the IUOE hall and spoke with Local 18 representatives, including Justin Gabbard. Wise explained his concerns about joining Local 18, the most significant of which being he was nearing retirement under the Teamsters retirement plan and would have to work longer in order to retire under the IUOE plan. Gabbard spoke with Wise, but he ultimately told Wise that if he did not join Local 18, he would be taken off the schedule. (Tr. 537.)

In early February, Wise went to the IUOE hall to submit his packet and pay his fees. While there, Wise spoke with Gabbard and Richard E. Dalton, IUOE Local 18 business manager. Wise informed Dalton about his concerns about leaving the Teamsters and joining IUOE Local 18. Dalton attempted to address Wise's concerns by highlighting the benefits of being a member of the IUOE, namely its well-funded retirement plan. Wise continued to state his concerns. Dalton eventually told Wise that he would need to join Local 18; otherwise, he would be taken off the schedule. (Tr. 543–545.)[14]

[14] Both Wise and Dalton testified about this conversation, and Dalton denied threatening Wise that he would be taken off the schedule if he did not join IUOE Local 18. I credit Wise over Dalton. Wise struck me as a more honest and forthright witness who had a clearer recollection of the contents of this conversation. Additionally, Dalton's statements are consistent with Gabbard's statement to Wise, as well as the statements of Stein's supervisors to several of the employees who were told they needed to join Local 18.

In mid-February, during a morning meeting, Westover told Bowling and other employees that if they did not complete and submit their permit packets to IUOE Local 18, they would be taken off the schedule. (Tr. 263.) Westover also stated that the Local 18 field representative would be out at the facility to talk to employees. (Tr. 263–264.) A few days later, an unidentified Local 18 representative came out to the jobsite and talked to employees, but not to Bowling. Bowling later told Westover that the representative had not spoken to him. Westover then left to talk with the representative. When Westover returned, he told Bowling he told the representative, "Here, give me your permit packets. I will do your job." Westover then passed out the packets to those who needed one. (Tr. 267.)

Also, in February, Local 18 Business representative Justin Gabbard came to the jobsite to pass out envelopes to employees. (Tr. 223.) Gabbard was not able to see every employee on his list, so he left the remaining envelopes with Doug Huffnagel and asked him to distribute them to the correct employees. (Tr. 224–225). Huffnagel agreed to do so. Huffnagel also permitted Gabbard to come back out to the jobsite another time to distribute additional envelopes to employees. (Tr. 225.)

In mid-February or early March, Stein's site superintendent, Jeff Porter, told laborers and drivers present in the health and welfare office at the AK Steel Middletown location that "if you guys don't get signed up with Local 18 Operating Engineers, we're going to have to take you off the schedule until you do." Oba Venters, a former TMS laborer represented by Laborers Local 534 hired by Stein, was present and testified about Porter's statement. (Tr. 466–467.)[15]

11. *Cross-Training*

As stated, when Doug Huffnagel began working at the Middletown jobsite in the fall 2017, he observed TMS's operations and the employees performing the work. In Huffnagel's opinion, there were certain inefficiencies with how the work was performed, specifically as it related to the strict adherence to the work jurisdiction among the three bargaining units. In order to reduce or eliminate these inefficiencies, Huffnagel's intention was to cross-train employees to perform tasks outside their traditional job duties.

In the days, weeks, and months after Stein took over the slag/scrap work, it began cross-training a few employees to perform certain tasks outside their traditional job duties, and had those employees perform those tasks in addition to their traditional job duties. For example, Ova Venters is a former TMS laborer that Stein hired and later trained to perform certain tasks outside his traditional laborer job duties, in addition to his traditional laborer duties. By January 3, Venters was trained and occasionally operating a bobcat, and, by January 17, he was trained and occasionally operating a backhoe, both are jobs previously only performed by operators. By January 23, Venters was trained to operate the water truck, and there were instances thereafter when he was assigned to perform that job, which is a job previously only performed by drivers. In February, Venters continued to be assigned to operate the backhoe and the bobcat. He also drove the pickup truck to go get parts, a job previously only performed by drivers.

Tim Wilhoite is a former TMS laborer that Stein hired and trained to perform certain tasks outside his traditional laborer job duties, in addition to his traditional laborer duties. By January 9, Wilhoite was trained and occasionally operating the telehandler, a job previously only performed by operators. By mid-February, Wilhoite was trained and occasionally running bobcats/skid steers. By February 27, Wilhoite was trained and occasionally assigned to operate front-end loaders. Wilhoite also began driving the pick-up trucks to drive off site to get parts, a job previously only performed by drivers.

[15] The General Counsel has requested that I draw adverse inferences based on the Stein's failure to call Jason Westover and Jeff Porter, and IUOE Local 18's failure to call Justin Gabbard, as witnesses. I find adverse inferences are unnecessary because the credited testimony is uncontradicted.

Chris Michaels is a TMS laborer that Stein hired and cross-trained to perform certain tasks outside his traditional laborer job duties, in addition to his traditional laborer duties. By January 8, Michaels was trained and occasionally running a backhoe. The following day, he was running skid steers. He continued to perform these tasks throughout January. By February 11, Michaels was trained and assigned to operate the telehandler. He continued to operate the backhoes, skid steers, and the telehandler throughout February. All of these were jobs previously only performed by operators.

Troy Neace is a TMS laborer that Stein hired and cross-trained to perform certain tasks outside his traditional laborer job duties, in addition to his traditional laborer duties. By late January, Neace was trained and occasionally running backhoes. He also was making off-site parts runs using one of the company pickup trucks. As of February 8, Neace was trained and assigned to run the processing plants. That became his primary assignment.

Michael Young is a former TMS laborer that Stein hired. In March, Stein began cross-training Young to perform certain tasks outside his traditional laborer job duties, such as operating bobcats and operating off-road dump trucks, in addition to his traditional laborer duties. Michael Kingery is a former TMS operator that Stein hired. In early March, Kingery was trained and began operating the off-road dump trucks. He also performed manual labor work, such as shoveling. He performed these tasks in addition to his traditional operator duties.

IV. CONTENTIONS OF THE PARTIES

The primary issues are whether Stein is a lawful successor to TMS, and, if so, whether it had the right to unilaterally set initial terms and conditions of employment for the employees in the drivers unit. General Counsel alleges Stein is the successor to TMS, and that it violated Section 8(a)(1), (2), (3), and (5) of the Act by failing and refusing to recognize and bargain with Teamsters Local 100 as the exclusive bargaining representative of the drivers unit; by failing to apply and unilaterally changing the terms and conditions of employment applicable to the drivers unit; by unlawfully recognizing and entering into, maintaining, and enforcing a collective-bargaining agreement with IUOE Local 18 as the representative of the drivers unit when Local 18 did not enjoy support from a majority of the employees in that unit; by maintaining and enforcing the union-security and dues-checkoff provisions in that agreement; by conditioning employment upon employees joining and becoming members of IUOE Local 18; and by rendering unlawful assistance when Local 18 did not enjoy unassisted and uncoerced support among a majority of the employees in the drivers unit. For its role in the above-cited unlawful conduct, and by threatening employees to get them to join and pay dues and fees, the General Counsel also alleges that IUOE Local 18 violated Section 8(b)(1)(A) and (b)(2) of the Act.

Respondents contend Stein is not a successor to TMS and had no obligation to recognize and bargain with Teamsters Local 100. They further argue that IUOE Local 18 was lawfully recognized as the representative of the merged unit based on cards showing majority support, and Respondents lawfully entered into, maintained, and enforced a collective-bargaining agreement covering that unit of employees.

V. LEGAL ANALYSIS

A. Stein is a successor to TMS and, therefore, obligated to recognize and bargain with Teamsters Local 100 as the exclusive collective-bargaining representative of the drivers unit.

1. *Legal Precedent*

Under *NLRB v. Burns Security Services*, 406 U.S. 272, 281–295 (1972),[16] the union's majority status is presumed to continue, and the successor is obligated to bargain with the union(s) representing the predecessor's employees, when: (1) there is substantial continuity between the two enterprises, (2) the successor hired as a majority of its employees the predecessor's employees, and (3) the bargaining unit that existed remains appropriate. See also *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43–54 (1987); and *Ports America Outer Harbor*, 366 NLRB No. 76, slip op. at 2 (2018).

In *Fall River Dyeing*, the Supreme Court held the presumption of majority support is particularly pertinent in the successorship situation because:

> During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it. While being concerned with the future of its members with the new employer, the union also must protect whatever rights still exist for its members under the collective-bargaining agreement with the predecessor employer. Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor.
>
> The position of the employees also supports the application of the presumptions in the successorship situation. If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace. In addition, after being hired by a new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff and problems associated with it. Without the presumptions of majority support and with the wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence.

Id. at 41 (footnote omitted).

The Court also emphasized that the successorship doctrine "safeguard[s] the rightful prerogative of owners independently to rearrange their businesses." *Fall River Dyeing*, 482 U.S. at 40 (internal quotations omitted). The successor is "under no obligation to hire the employees of its predecessor, subject, of course, to the restriction that it not discriminate against union employees in hiring." Id. Thus, the applicability of the successorship doctrine rests in the hands of the new employer: if the new employer makes a conscious decision to maintain generally the same business and take advantage of the trained work force of its

[16] In *Burns*, the William T. Burns International Detective Agency replaced Wackenhut Corporation as the security contractor for Lockhead at one of its plants. Burns hired 27 Wackenhut employees in June, and, in offering them employment, explained that it could not live with the existing contract between Wackenhut and the United Plant Guard Workers (UPGW), which represented the guards. Burns transferred 15 of its own guards from other locations. Burns commenced operations on July 1. Prior to commencing operations, Burns recognized the American Federal of Guards (AFG) as the union representing the employees at the Lockhead facility. AFG was a union with which Burns had contracts at other locations. On July 12, UPGW demanded that Burns recognize the union as the exclusive representative of Burns' employees at Lockheed and honor the contract UPGW had negotiated with Wackenhut. Burns refused. In applying the above factors, the Supreme Court held that Burns was a successor to Wackenhut and obligated to recognize and bargain with UPGW, but it was not obligated to honor its contract with Wackenhut.

predecessor by hiring a majority of them, then it has an obligation to recognize and bargain with their representative. Id. at 40-41.

a. Substantial Continuity

The first inquiry is whether there is a "substantial continuity" between Stein and TMS in the performance of the slag/scrap work at the AK Steel Middletown location. *Fall River Dyeing*, 482 U.S. at 43. This is based upon the totality of the circumstances and requires the Board focus on whether the new entity has taken over substantial assets of the predecessor and "continued, without interruption or substantial change, the predecessor's business operations." Id., quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973). The Supreme Court has identified the following factors as relevant to the analysis: (1) whether the business of both employers is essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new entity has the same production process, produces the same products, and basically has the same body of customers. *Fall River Dyeing*, supra at 43. Most importantly, these factors are to be analyzed from the perspective of the employees who worked for the predecessor, i.e., whether they "understandably view their job situations as essentially unaltered." Id. (quoting *Golden State Bottling Co*., supra at 184).

In applying these factors, I find there is substantial continuity exists between Stein and TMS. The two are competitors, both engaged in the business of slag/scrap work at locations throughout the country. Stein replaced TMS as the contractor and immediately began performing the same work, producing the same product, for the same customers, at the same location. Furthermore, Stein acquired all of TMS's property and assets (except for the computer equipment) used to perform the slag/scrap work. And there was no hiatus in operations: a majority of the employees ended their employment with TMS on December 31, 2017, and began their employment with Stein on January 1. Although Stein changed the work schedules, purchased additional equipment, hired several new supervisors, and later began cross-training certain employees to perform new and different duties (discussed below), each of the employees who testified confirmed that, from their perspective, they continued performing the same work in substantially the same manner as performed prior to January 1, just for a different employer. See *Empire Janitorial Sales & Services, LLC*, 364 NLRB No. 138 (2016)(finding substantial continuity even though successor hired new supervisors and maintenance employees and provided different uniforms to wear and cleaning products to use, because the employees continued performing the same work with no hiatus); *A.J. Myers & Sons, Inc.,* 362 NLRB No. 51, slip op. at 7 (2015) (differences in equipment, location, and supervision did not defeat finding of continuity of operations); *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063–1064 (2001) (finding substantial continuity where employees continued to perform essentially the same work even though successor provided different supervision, different pay rates and benefits, and newer equipment); and *M.S. Management Associates, Inc.*, 325 NLRB 1154, 1155 (1998) (finding substantial continuity where the successor provided the same services to the same set of customers and with the same equipment, with no hiatus in operations, even though the successor used a different supervisory staff), enfd. 241 F.3d 207 (2d Cir. 2001). See also *Banknote Corp. of America v. NLRB*, 84 F.3d 637 (2d Cir. 1996), enfg. 315 NLRB 1041 (1994), cert. denied 519 U.S. 1009 (1996) (even though successor purchased a significant amount of new equipment, the type of equipment purchased was similar to the equipment upon which the predecessors' employees worked). Based on the totality of the circumstances, I find the drivers and laborers would understandably view their job situations as essentially unaltered.

b. Hired a Majority of Predecessor's Employees

The second inquiry is whether Stein hired as majority of its work force former TMS employees. As a general rule, the relevant measuring day to determine if the successor employed a majority of the predecessor's employees is the initial date the successor began operating. See *Vermont Foundry Corp*., 292 NLRB 1003, 1009 (1989). That was the situation in *Burns*, where, as here, the successor began operating

the day after the predecessor ceased operations with a majority of its employees drawn from the predecessor's work force. 406 U.S. at 272. In *Fall River Dyeing*, the successor took over and began operations after a hiatus that lasted several months. The new employer started up operations and hired employees gradually over time. Explicitly contrasting the situation to that in *Burns*, the Court in *Fall River Dyeing* pointed out that:

> [i]n other situations, as in the present case, there is a start-up period by the new employer while it gradually builds its operations and hires employees. In these situations, the Board, with the approval of the Courts of Appeals, has adopted the "substantial and representative complement" rule for fixing the moment when the determination as to the composition of the successor's work force is to be made. If, at this particular moment, a majority of the successor's employees had been employed by its predecessor, then the successor has an obligation to bargain with the union that represented these employees.

482 U.S. at 47 (footnotes omitted).

In *Fall River Dyeing,* the Court approved as reasonable the Board's substantial and representative complement rule, which evaluates the successor's bargaining obligation when a substantial and representative complement of employees is hired.[17] A substantial and representative complement of employees will be found to exist at the point at which an employer's job classifications are substantially filled, its operations are in substantially normal production, and it does not reasonably expect to increase the number of unit employees. *Fall River Dyeing*, 482 U.S. at 49.

Without distinguishing the extended startup situation in *Fall River Dyeing* from the more seamless transfer of operations in *Burns*, many Board cases since *Fall River Dyeing* have applied the substantial and representative complement formula generally, with the requirement that a bargaining demand is necessary to trigger the successor's duty to bargain. See, e.g., *Ports America Outer Harbor*, supra slip op. at 2; *Jamestown Fabricated Steel and Supply, Inc.*, 362 NLRB 1314 (2015); *A.J. Myers & Sons, Inc.*, supra; and *Hampton Lumber Mills-Washington*, 334 NLRB 195 (2001), enfd. 38 Fed.Appx. 27 (D.C. Cir. 2002). It is well-settled that a valid demand for recognition or bargaining "need not be made in any particular form … so long as the request clearly indicates a desire to negotiate and bargain" on behalf of the unit employees. *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 10 (2007) (quoting *Marysville Travelodge*, 233 NLRB 527, 532 (1977)). See also *Paramus Ford*, 351 NLRB 1019, 1026–1027 (2007); and *MSK Corp.*, 341 NLRB 43, 45 (2004).[18]

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[17] In *Fall River Dyeing,* the Court explained, the "[substantial and representative complement] rule represents an effort to balance the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible. . . . The latter interest is especially heightened in a situation where many of the successor's employees, who were formerly represented by a union, find themselves after the employer transition in essentially the same enterprise, but without their bargaining representative." 482 U.S. at 48–49 (internal quotation marks omitted). That is precisely the situation here.

[18] The Board has recognized circumstances where a union's request to bargain would be futile, such as when the notice by an employer is too short before the actual implementation for meaningful bargaining, or when the employer has no intention of changing its mind. In those instances, the notice, if any, is of a fait accompli, and the union will not have waived its rights by failing to timely request bargaining. See generally *General Die Casters, Inc.*, 359 NLRB 89, 105 (2012); *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023–1024 (2001); and *Ciba-Ceigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). Based on the evidence, I find that well before January 1, Stein had a fixed intent to merge the units, recognize IUOE Local 18 as the representative of that merged unit, and maintain and enforce the terms of Respondents' collective-bargaining agreement on all employees, regardless of their chosen bargaining representative. It, therefore, would have been futile for Teamsters Local 100 to demand recognition/request bargaining, because Stein's recognition of IUOE Local 18, and the implementation of the changes to the terms and conditions of employment, were a fait accompli.

As stated, the parties stipulated that on January 1 and/or by January 6, Stein had hired and employed a "substantial and representative complement" of employees to perform the slag/scrap work at AK Steel's Middletown location, and the evidence establishes that a majority of those employees previously worked for TMS. In fact, it was by January 2 that Stein had hired and employed as a majority of its work force a majority of the former TMS employees from *each of the three bargaining units*. On January 10, Teamsters Local 100 made its written demand for recognition and request for bargaining. As a result, I find that by at least January 10, Stein had an obligation to recognize and bargain with Local 100 as the exclusive representative of the drivers unit.

c. Appropriateness of Unit

The third inquiry is whether the bargaining unit of the predecessor remains appropriate for the successor. See *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994), enfd. 84 F.3d 637 (2d Cir. 1996), cert. denied 519 U.S. 1109 (1997); and *Paramus Ford*, 351 NLRB at 1023. In *Burns*, supra, the Supreme Court found that the successor employer (Burns) was obligated to bargain with the union that represented the employees of the predecessor (Wackenhut), but it observed that: "It would be a wholly different case if the Board had determined that because Burns' operational structures and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one." 406 U.S. at 280. The Board's longstanding policy is that a "mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness." *Cadillac Asphalt Paving Co*., 349 NLRB 6, 9 (2007); and *Indianapolis Mack Sales & Service*, 288 NLRB 1123, 1126 (1988)(historical unit likely appropriate if the predecessor employer recognized it, even if the unit would not be appropriate under Board standards if it were being organized for the first time). A party challenging a historical unit bears the heavy burden of showing that the unit is no longer appropriate. Id. In *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111 (D.C. Cir. 1996), enfg. 318 NLRB 738 (1995), the Court held:

> [A] successor employer can meet this burden by showing that a historical unit is "repugnant to Board policy[;] "that "compelling circumstances" are present that "overcome the significance of bargaining history[;]" that the unit is "so constituted as to hamper employees in fully exercising rights guaranteed by the Act[;]" or that the historical units no longer "'conform reasonably well to other standards of appropriateness.'"

Id. at 118 (internal citations omitted). See also *Deferiet Paper Co. v. NLRB*, 235 F.3d 581, 584 (D.C Cir. 2000) (an alleged successor may demonstrate that a preexisting unit is no longer appropriate by showing significant revisions in plant operations and employee duties).

The continued appropriateness of the historical unit is measured at the time the bargaining obligation attaches. *Cadillac Asphalt Paving Co*., 349 NLRB at 9.

Respondents argue as result of the cross-training and assignment of cross-jurisdictional work, the three separate units are no longer appropriate because they have been functionally integrated into one merged unit. In *Banknote Corp. of America*, supra, the Board considered the possible accretion of existing units into a larger single unit in the successorship context as a result of cross-training. In that case, after the successor acquired the facility, it met with the unions to advise them it intended to have a more flexible operation with respect to the jobs that employees would perform, and that it would cross-train employees so that they would be able to perform various functions. It also informed job applicants during their interviews that they would be asked to perform additional tasks outside their normal job duties. Thereafter, the successor cross-trained and assigned certain employees to perform sporadic and occasional duties across unit lines. The Board found the evidence was largely conclusory, and while certain of the successor's

employees were assigned to fill in on a wider scope of new duties, they continued to serve as the primary, if not sole, employees performing their traditional duties. The Board ultimately held the successor failed to establish that the historical units were no longer appropriate, particularly where many of the changes in job duties occurred after the bargaining obligation attached.

The result is the same here. First of all, as explained below, the cross-training and assignment of cross-jurisdictional work is the direct result of Stein's unlawful unilateral changes to the contractual provisions addressing the definition and assignment of work. See *Dodge of Naperville*, 357 NLRB 2252, 2253–2254 (2012) ("In determining whether an established bargaining unit retains its distinct identity, we do not consider the effects of the Respondent's unlawful, unilateral changes to the existing unit employees' terms and conditions of employment, as giving weight to such changes would reward the employer for its unlawful conduct.") (and cases cited therein).

Second, none of the employees who were cross-trained or assigned cross-jurisdictional work were drivers. As for the rest, those assignments did not occur on such a regular and widespread basis as to alter the appropriateness of the three historical units. The record reflects that only 5 laborers and 1 operator (Venters, Young, Wilhoite, Michaels, Neace, and Kingery) were cross-trained and performing some cross-jurisdictional work before the end of March.[19] Two of the 6 did not begin performing cross-jurisdictional work until March, well after the bargaining obligation attached. Of the remaining 4 employees—all laborers—3 began performing limited cross-jurisdictional work prior to Teamsters Local 100's January 10 demand for recognition/request for bargaining. In other words, only 3 out of the 60 employees Stein hired were cross-trained and performing cross-jurisdictional work as of the date the bargaining obligation attached. Moreover, based on the evidence, these employees continued to spend a majority of their work time performing their traditional job duties, at least through February. Consequently, I find that as of the January 10 date the bargaining obligation triggered, Respondent failed to present compelling circumstances that the separate drivers unit was no longer appropriate, or that the unit was repugnant to Board policy or hampered employees' exercise of their rights guaranteed by the Act.

Respondents cite to *Border Steel Rolling Mills, Inc.*, 204 NLRB 814, 821 (1973), for support of its contrary position. In that case, the employer acquired a truck repair/maintenance business and hired its employees who were represented by the Teamsters. The employer already had employees who performed repair/maintenance work on certain mobile equipment (e.g., forklifts and cranes), but not trucks. Those employees were part of a plant-wide unit represented by the Steelworkers. Following the acquisition, the employer created a new department to handle all mobile maintenance, including equipment and trucks, and it implemented other operational and physical changes. Thereafter, it merged the truck repair/maintenance employees from the acquired business into the plantwide Steelworkers unit. The Board held the merger was lawful, because the Teamsters unit had become completely functionally integrated as result of these changes that it no longer maintained a separate identity.

[19] At the hearing, I allowed Respondents to introduce evidence related to this cross-training and cross-jurisdictional assignment of work through March, but not beyond. I rejected proffered exhibits after that date as being irrelevant because they post-dated the demands for recognition/requests for bargaining. But I allowed Respondent to question witnesses about their duties during the months that followed, in the event I changed my ruling regarding the exhibits. In its post-hearing brief, Stein requests that I reverse my rulings and consider the evidence after March. I decline to do so and maintain my earlier rulings that the evidence is irrelevant. As stated, Respondents must prove that as of the date the demand for recognition/request for bargaining there were compelling circumstances that made the historical units no longer appropriate. See *Cadillac Asphalt Paving Co*., 349 NLRB 9; and *Banknote Corp. of America*, 315 NLRB at 104. See also *Ford Motor Co*., 367 NLRB No. 8, slip op. at 12 (2018) ("The point of the successorship doctrine is that employees' representational rights do not get put on hold--much less substituted with a union of [the employer's] choice--while [the employer] spends months training additional employees . . .). The rejected exhibits—which all postdate Teamsters Local 100's demand for recognition/bargaining--are irrelevant, as is the testimony regarding cross-training and assignment of work after March. That evidence is hereby stricken.

Border Steel is distinguishable from this case. It involved the addition of a new classification of employees who performed truck maintenance and repair to an existing facility-wide unit following a sale. The laborers, operators, and drivers have existed at the AK Steel Middletown location for decades, where they have maintained their own separate identities and collective-bargaining agreements. In *Border Steel*, the employer made several operational and physical changes, in addition to creating a new department. Here, the only change is that a few of the employees received cross-training and were assigned occasional cross-jurisdictional work, in addition to continuing to perform their traditional duties. I find, unlike the widespread changes that occurred in *Border Steel*, the limited (and, as discussed below, unlawful) changes here did not result in the three units becoming so functionally integrated that they no longer maintained their separate identities.

In light of the evidence, I find that since January 1, Stein replaced TMS as the contractor performing the slag/scrap work at AK Steel's Middletown location and has continued to perform that work in substantially unchanged form, employing as a majority of its employees former TMS employees, including a majority of the TMS drivers unit. Stein, therefore, is TMS's successor and inherits its recognitional and bargaining obligations toward Teamsters Local 100.

2. *Respondents' Section 9(a) and 8(f) Defenses*

Respondents contend that even if Stein is a successor to TMS, it had no obligation to bargain with Teamsters Local 100 because there is no evidence of a Board election/certification or a voluntary recognition based on evidence of majority support, establishing that Teamsters Local 100 is the Section 9(a) representative of the drivers unit. The record contains the 2010-2013 and 2013-2016 agreements between Local 100 and Tube City IMS, LLC, and the 2016–2017 agreement between Local 100 and TMS. All three recognize Local 100 as the sole and exclusive bargaining agent of the drivers unit. In *Barrington Plaza & Tragniew, Inc.*, 185 NLRB 962 (1970), enfd. in part 470 F.2d 669 (9th Cir. 1972), the Board held that in a refusal-to-bargain case involving a previously recognized union, the requisite proof of majority status need not take the form of a Board certification or card showing:

> The existence of a prior contract, lawful on its face, raises a dual presumption of majority—a presumption that the union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract.
>
> Following expiration of the contract, this presumption continues and is not dependent on independent evidence that the bargaining relationship was originally established by a certification or majority card showing. The presumption applies not only to a situation where the employer charged with a refusal to bargain is itself a party to the preexisting contract, but also to a successorship situation such as we have here. The burden of rebutting this presumption rests, of course, on the party who would do so. It is true that a labor organization's continuing majority may not be questioned during the term of a contract. On the other hand, upon expiration thereof, the presumption of majority arising from a history of collective bargaining may be overcome by "clear and convincing proof" that the union did not in fact enjoy majority support at the time of the refusal to bargain. At such time, it is also a valid defense for the employer to "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status. . . ."

Id. at 963 (internal footnotes omitted).[20]

Furthermore, assuming there was some defect in the recognition established by these prior agreements, the Board has held that a successor may not attack a union's initial recognition by the predecessor when that recognition was beyond the Section 10(b) 6-month limitations period. *Eye Weather*, 325 NLRB 973 (1998), citing *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960) (respondent may not defend against a refusal-to-bargain allegation on the grounds that the original recognition, occurring more than 6 months before charges were filed in the proceeding raising the issue, was unlawful.). See also *Red Coats Inc*., 328 NLRB 205, 206-207 (1999) (employer may not defend against a refusal-to-bargain allegation on the basis that the original recognition of the union was unlawful, where that recognition occurred more than 6 months before the charges raising the issue had been filed); *Sewell-Allen Big Star*, 294 NLRB 312, 313-314 (1989) (same). As stated, Local 100 has been recognized as the exclusive bargaining representative of the unit of drivers since at least 2010, and there is no evidence of any timely challenge to that status.

Citing to *Davenport Insulation*, 184 NLRB 908 (1970), Respondents argue that Local 100's relationships with these predecessor contractors were all under Section 8(f) of the Act; therefore, Stein had no obligation to recognize or bargain after the most recent contract expired on December 31, 2017. The Board has held that when the parties' bargaining relationship is governed by Section 8(f), either party is free to repudiate the relationship and decline to negotiate or adopt a successor agreement once the contract expires. *Oklahoma Fixture Co*., 333 NLRB 804, 807 (2001), enf. denied 74 Fed.Appx. 31 (10th Cir. 2003); *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). However, the plain reading of Section 8(f) of the Act reveals that it is only applicable to "an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members. . . ." See *Techno Construction Corp*., 333 NLRB 75, 83-84 (2001). The burden of proof lies with the party seeking to avail itself with the Section 8(f) statutory exception. *Bell Energy Management Corp*., 291 NLRB 168, 169 (1988); and *Hudson River Aggregates, Inc*., 246 NLRB 192, 199 (1979), enfd. 639 F.2d 865 (2d Cir. 1981)).

However, the parties *stipulated* that this slag/scrap work, as it has been performed by Stein, TMS, and the predecessor contractors at the AK Steel Middletown location, is not, and has never been, building and construction industry work. (Jt. Exh. 1.) Setting that aside, the Board has held that "the so-called building and construction concept subsumes the provision of labor whereby materials and constituent parts may be combined on the building site to form, make, or build a structure." *Teamsters Local 83*, 243 NLRB 328, 331, (1979) (quoting *Carpet, Linoleum & Soft Tile Local No. 1247*, 156 NLRB 951, 959 (1966)). Respondents failed to present any evidence that the employees performing the slag/scrap work for Stein, TMS, or any of the predecessor contractors are or were engaged in this sort of activity.[21]

[20] Respondents contend that IUOE Local 18 presented evidence of majority support of among the employees performing the slag/scrap work when Local 18 presented Stein with signed authorization cards designating Local 18 as their bargaining representative. (Local 18 Exh. 3). These cards, which all predate October 2017, were gathered from employees who were members of Local 18 prior January 1. None of the cards were signed by individuals from the drivers unit or the laborers unit. Therefore, since none of those employees designated Local 18 to be their bargaining representative, there is no evidence of loss a majority support.

[21] Even though the processed slag is often used as an aggregate for road construction, the Board has held that suppliers of construction materials are, without more, not engaged primarily in the building and construction industry. See *Irving Ready-Mix, Inc*., 357 NLRB 1272 (2011) (a ready-mix cement supplier is not a construction employer within the meaning of Section 8(f) of the Act).

Respondents largely ignore their evidentiary burden and, instead, focus on contractual language to support their arguments.[22] They argue that the Teamsters Local 100 agreement contains a hiring hall procedure that would be illegal under Section 9(a); therefore, the parties must have intended for their agreement to be covered under Section 8(f). First, and foremost, intent is irrelevant if the employer and employees at issue are not engaged primarily in the building and construction industry. Second, the Board has consistently rejected arguments to invalidate an agreement or collective-bargaining relationship because of an unlawful contractual provision. In *Teamsters Local 83*, supra at 333, the Board found certain employers were not engaged primarily in the building and construction industry, and therefore certain hiring hall provisions in their collective-bargaining agreements were not protected by Section 8(f)(4) of the Act. In doing so, the Board did not strike down the agreements, but merely found the maintenance, enforcement, and giving effect to the hiring hall provisions violated the Act. In *Flying Dutchman Park, Inc.*, 329 NLRB 414, 416 (1999), the Board held that while a union-security provision was unlawful because it did not provide newly hired employees the legally established grace period in which to become union members, such a provision does not render the entire contract unenforceable. In *Royal Components, Inc.*, 317 NLRB 971, 972–973 (1995), the Board held an employer was not engaged in the building and construction industry simply because it entered into a collective-bargaining agreement with a 7-day membership grace period, which is allowed in the construction industry, but not for employers outside that industry. The Board found the maintenance of the union-security provision to be unlawful, but refused to entertain the respondent's contention that the union lacked majority status at the time the contract was executed since the asserted lack of majority status was not challenged within the 6-month period from the time the contract was executed. See also *Raymond F. Kravis Center for Performing Arts, Inc. v. NLRB*, 550 F.3d 1183 (D.C. Cir. 2008) (holding that stagehands working at a concert hall were not employed in the "construction industry" even though they were hired through a hiring hall arrangement).

As such, I find Teamsters Local 100 is, and has been, the 9(a) representative of the drivers unit.

3. *Conclusion*

As the lawful successor to TMS, Stein was obligated to recognize and bargain with Teamsters Local 100 as the 9(a) bargaining representative of the drivers unit. By their conduct, I find Stein violated Section 8(a)(5), (3), (2), and (1) of the Act, and IUOE Local 18 violated Section 8(b)(1)(A) and (b)(2) of the Act, as alleged in the amended consolidated complaint. See generally, *Ports America Outer Harbor*, supra; *Regency Grande Nursing & Rehabilitation. Center*, 347 NLRB 1143 (2006); *Polyclinic Medical Center of Harrisburg*, 315 NLRB 1257 (1995); and *Rockville Nursing Center*, 193 NLRB 959, 965 (1971). Stein violated Section 8(a)(5) and (1) since at least January 10, when it refused Local 100's demand for recognition/request for bargaining. Stein also violated Section 8(a)(2) and (1) since about October 12, 2017, when it recognized IUOE Local 18 as the exclusive bargaining representative of the employees in the drivers unit, and since December 22, 2017, when it entered into, and since January 1, when it began maintaining and enforcing a collective-bargaining agreement with Local 18, even though Local 18 did not represent an uncoerced majority of the employees in that unit. The agreement sets forth the terms and conditions of employment applicable to the employees in the drivers unit, including union-security and

[22] Stein argues that one of TMS's predecessors, McGraw Construction Company, was engaged in the building and construction industry, because the name of the company contains the word "construction," and there is 1961 Board decision in which the company was, for jurisdictional purposes, found to have been engaged primarily in the building and construction industry when it performed a major renovation project at the now-AK Steel Middletown location. (Stein. Br. 41–42). Suffice it to say, this evidence from over 50 years ago about a contractor on an unrelated project falls well short of meeting the burden of establishing that Stein, TMS, or any of the other predecessor contractors were engaged primarily in the building and construction industry *while performing the slag/scrap work at AK Steel's Middletown location.*

dues-checkoff provisions. By maintaining and enforcing these provisions, Stein violated Section 8(a)(3) and (1) of the Act because it unlawfully encouraged employees in the drivers unit to join and pay dues to Local 18 at a time when it was not lawfully recognized a bargaining representative of those employees. Similarly, I find that IUOE Local 18 violated Section 8(b)(1)(A) and (2) of the Act by accepting recognition from Stein as bargaining representative of the employees in the drivers unit, by entering into, maintaining, and enforcing the terms of Respondents' collective-bargaining agreement, and by receiving dues and fees from the employees in the drivers unit, at a time when it did not lawfully represent those employees.

B. Stein forfeited its right as a successor to set the initial terms and conditions of employment applicable to the drivers unit.

In *Burns*, supra, the Supreme Court held that a successor is not bound by the substantive terms of a collective-bargaining agreement negotiated by the predecessor and is ordinarily free to unilaterally set initial terms and conditions of employment.[23] The Court recognized, however, that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294-295. In *Spruce Up Corp*., 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), the Board interpreted the "perfectly clear" caveat in *Burns* as "restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." Id. at 195 (footnote omitted).[24] In this case, each of the employees who testified confirmed that Huffnagel advised them during the November 9, 2017 mandatory meetings that those who wanted to work for Stein would need to fill out an application, sit down for an interview, and be subjected to a physical, drug test, and background check—and there were no guarantees of employment. Huffnagel also announced that there would be several significant changes to their wages, hours, and other terms and conditions of employment. As a result, I find Stein is not a "perfectly clear" successor, and, thus, theoretically permitted to set initial terms and conditions of employment.

[23] Under *Burns*, supra, a successor employer is permitted to set initial terms only to the extent encompassed by Section 8(d) of the Act. That does not include the right to change the scope or composition of the bargaining unit. *SFX Target Center Arena Management, LLC*, 342 NLRB 725, 735 (2004). Parties, therefore, cannot be compelled to bargain to impasse over such changes. See *Bozzuto's, Inc.*, 277 NLRB 977 (1985), and *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956, 964-965 (10th Cir. 1980), cert. denied 450 U.S. 911 (1981). If they were, an employer could "use its bargaining power to restrict (or extend) the scope of union representation in derogation of employees' guaranteed right to representatives of their own choice." *Idaho Statesman v. NLRB*, 836 F.2d 1396 (D.C. Cir. 1988). In *SFX Target Center*, supra at 735, the Board adopted the judge's finding that:

> To the contrary, the Court has held explicitly that preservation of work traditionally performed is "[a]mong the primary purposes protected by the Act." [*NLRB v. International Longshoremen's Ass'n*,] 447 U.S. 490, 504 (1980). It hardly promotes industrial peace to allow successor-employers to sort and sift through historical bargaining units of employees, whom those employers are continuing to employ under the same circumstances, picking and choosing the extent to which they will recognize and not recognize the historical bargaining agent as the exclusive collective-bargaining representative of historically-represented employees.

[24] The Board has since clarified that, although the Court in *Burns*, and the Board in *Spruce Up*, spoke in terms of a "plan[] to retain all of the employees in the unit," the relevant inquiry is whether the successor "[p]lanned to retain a sufficient number of predecessor employees to make it evident that the Union's majority status would continue" in the new work force. *Data Monitor Systems, Inc*., 364 NLRB No. 4, slip op. at 3 (2016); *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 3 (2016); and *Galloway School Lines*, 321 NLRB 1422, 1426–1427 (1996).

The Board, however, has held that a successor may forfeit its right to unilaterally set initial terms and conditions of employment by engaging in concomitant unfair labor practices. See, e.g., *Galloway School Lines, Inc.* 321 NLRB 1422 (1996) (successor forfeited right to set initial terms by violating Section 8(a)(3) with unlawful hiring plan designed to avoid having to recognize the collective-bargaining representative of the predecessor's employees; as a remedy, ordered to restore and maintain previous terms and conditions); *U. S. Marine Corp*., 293 NLRB 669 (1989), enfd. en banc 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992); *Shortway Suburban Lines*, 286 NLRB 323 (1987), enfd. 862 F.2d 309 (3d Cir. 1988); *State Distributing Co*., 282 NLRB 1048 (1987); *Love's Barbeque Restaurant*, 245 NLRB 78 (1979), enfd. in relevant part sub nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981). See also *Smoke House Restaurant*, 347 NLRB 192, 203 (2006) (successor forfeited right to set initial terms by violating Section 8(a)(1) with statements to applicants that it would operate non-union; as remedy, ordered to restore and maintain previous terms and conditions); and *Advanced Stretchforming International*, 323 NLRB 529 (1997), enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000), on remand 336 NLRB 1153 (2001)(same).

In *Advanced Stretchforming*, the successor employer acquired the assets of the bankrupt predecessor and told the employees that a majority of them would he hired but there would be no union and no seniority. All employees interviewed for employment were informed that they would be working under new terms and conditions which were subject to change, the successor was not assuming the predecessor's collective-bargaining agreement, and they would be employed on an at-will basis. In finding a violation, the Board held:

> The fundamental premise for the forfeiture doctrine is that it would be contrary to statutory policy to "confer *Burns* rights on an employer that has not conducted itself like a lawful *Burns* successor because it has unlawfully blocked the process by which the obligations and rights of such a successor are incurred." [*State Distributing Co*., 282 NLRB at 1049]. In other words, the *Burns* right to set initial terms and conditions of employment must be understood in the context of a successor employer that will recognize the affected unit employees' collective-bargaining representative and enter into good-faith negotiations with that union about those terms and conditions.
>
> …
>
> At the time of successorship, however, the Respondent did not conduct itself like a lawful *Burns* successor. At this unsettling time of transition, when "a union is in a peculiarly vulnerable position" and employees "might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor," the Respondent unlawfully declared . . . that there would be no union for those whom it hired. Fourteen days later, the Respondent relied on the results of an employee poll tainted by [this] statement when it refused to bargain with the Union and thereafter refused to recognize the Union as the unit employees' representative.
>
> A statement to employees that there will be no union at the successor employer's facility blatantly coerces employees in the exercise of their Section 7 right to bargain collectively through a representative of their own choosing and constitutes a facially unlawful condition of employment. Nothing in *Burns* suggests that an employer may impose such an unlawful condition and still retain the unilateral right to determine other legitimate initial terms and conditions of employment. A statement that there will be no union serves the same end as a refusal to hire employees from the predecessor's unionized work force. It "block[s] the process by which the obligations and rights of such a successor are incurred." *State Distributing*, 282 NLRB at 1049.

Id. at 530–531 (footnotes omitted).

Relying on *Advanced Stretchforming*, the General Counsel argues the forfeiture doctrine applies in this case, and that Stein lost the right to set initial terms and conditions of employment, because of the serious nature of the unfair labor practices it committed prior to commencing operations on January 1. I agree. Under *Burns*, a successor's right to unilaterally set initial terms and conditions is based on the presumption that it will then, upon request, recognize and bargain in good faith with the affected unit employees' representative. Stein, however, had no intention of recognizing and bargaining in good faith with Teamsters Local 100 or Laborers Local 534. From the outset, Stein wanted one bargaining unit, represented by one union. In August 2017, before Stein was awarded the slag/scrap contract, it solicited IUOE Local 18 about merging the three units into one and recognizing Local 18 as the unit's exclusive bargaining representative. Stein took this action even though Respondents knew the laborers and drivers units were already represented, and there was no evidence that any—let alone a majority—of the employees in either of those units wanted to be represented by Local 18. After Local 18 agreed to this sham arrangement, Respondents met for negotiations, and, on October 12, 2017, Stein sent a draft agreement recognizing Local 18 as the exclusive bargaining representative for the merged unit, when Local 18 did not represent a majority of the employees in the drivers or laborers units, and when Stein had not yet hired a single employee to perform the slag/scrap work. As stated, Stein's conduct violated Section 8(a)(2) and (1) of the Act. Following this unlawful recognition, Stein began pressing Local 18 to execute their agreement quickly, so the new terms and conditions could be implemented once Stein commenced operations. Later, on November 9, 2017, Stein, through Huffnagel, informed all TMS employees that if they were hired by Stein their work would fall under Local 18's jurisdiction, which effectively informed the drivers and laborers that Stein would unlawfully refuse its obligation under *Burns* to recognize and bargain with their chosen representatives. This statement violates Section 8(a)(1) of the Act. See *Pressroom Cleaners*, 361 NLRB 643, 667 (2014)(statement to employees that they will not have their union at the successor employer's facility blatantly coerces employees in the exercise of their Section 7 rights to bargain collectively through a representative of their own choosing and constitutes a facially unlawful condition of employment).[25] Then, on December 22, 2017, Stein continued to violate Section 8(a)(2) and (1) of the Act when it executed the collective-bargaining agreement recognizing Local 18 as the unit's bargaining representative, even though Stein still had not received evidence that Local 18 had majority support among *any* of the three units, and before Stein had hired a substantial and representative compliment of employees. In fact, as of January 1, when Respondents began applying the terms of their collective-

[25] Although Huffnagel communicated Stein's intentions to the TMS employees during the November 9 meetings, I find he "actively or, by tacit inference, misled" Teamsters Local 100 regarding the company's intentions. *Spruce Up Corp*., 209 NLRB at 195. Specifically, in November 2017, Local 100 steward James Bowling asked Huffnagel if Stein "was going to go with all crafts." Huffnagel said he "couldn't say at this time." Later, Local 100 business agent Mike Lane asked Huffnagel if Stein intended to negotiate with the Teamsters and honor the contract in place, and Huffnagel said he "didn't know why not" but he "didn't really handle that and someone else would get back with [Lane] on that." Although Huffnagel was not present for the negotiations between Stein and IUOE Local 18, he knew what was occurring. He was copied on the October 12, 2017 email Stein sent to Local 18 with the draft of the contract, which clearly identified Local 18 as the bargaining representative for all trades and set forth new terms and conditions of employment. (GC Exh. 5). He also was copied on the October 23, 2017 email Stein sent to Local 18 with the marked-up copy of the contract, containing the agreed-upon changes. (GC Exh. 6.) Huffnagel had both documents before speaking with Bowling or Lane; yet, he gave the responses that he did.

Additionally, despite Huffnagel's statement that someone from Stein would get back to Lane about the company's intentions, no one did. The first time Stein communicated with Local 100 was on February 5, when Stein's attorney spoke to Local 100's attorney about the January 10 written demand for recognition and request for bargaining. In this conversation, Stein's attorney refused to recognize and bargain with Local 100, relying, in part, upon Stein's orchestrated, unlawful recognition of Local 18—a recognition based on authorization cards submitted *after* Local 100 made its January 10 written demand for recognition/request for bargaining. What's more, all of the cards presented were signed by operators; none by anyone in the drivers unit or laborers unit.

bargaining agreement to all employees, Stein still had not been presented with evidence that Local 18 had majority support among *any* of the three units.

Stein argues that applying the forfeiture doctrine in this case would be inconsistent with the holding in *Burns*. I reject this argument. As stated, under *Burns*, a successor employer is not bound by the substantive terms of a collective-bargaining agreement negotiated by its predecessor and is ordinarily free to set initial terms and conditions of employment unilaterally, absent it being a "perfectly clear" successor. The successor's duty to bargain will not normally arise before it sets initial terms because it is not usually evident whether the union will retain majority status in the new work force until after the successor has hired a substantial and representative complement of employees. *Burns*, 406 U.S. at 295. In reaching this conclusion, the *Burns* Court distinguished between the traditional unilateral change case and a successor setting initial terms and conditions of employment. It held the Board's traditional remedy awarded in the former would be inappropriate in the latter because the traditional successor has "no previous relationship whatsoever to the bargaining unit" and "no outstanding terms and conditions of employment from which a change could be inferred." 406 U.S. at 295.[26] Stein, however, is not a traditional *Burns* successor; it is not a stranger to this unit or uninvolved with the establishment of the terms and conditions of employment. On the contrary, Stein fabricated this bargaining unit by merging three separate, appropriate units, hand-picked the unit's bargaining representative, and determined the terms and conditions of employment, all *before* it hired *any* employees. Furthermore, while a traditional *Burns* successor is allowed *to set* initial terms and conditions of employment, it is not permitted *to negotiate* those terms and conditions with a union that does not represent an uncoerced majority of the employees in the unit at issue.

Based on this evidence, and the Board's holding in *Advanced Stretchforming*, I conclude that Stein forfeited its right to unilaterally set initial terms and conditions of employment by the serious nature of its unfair labor practices prior to January 1. Thus, I find Stein violated Section 8(a)(5) and (1) of the Act since January 1 when it failed to continue the terms and conditions of employment set forth in the Teamsters Local 100 contract with TMS and by unilaterally changing the following mandatory subjects of bargaining: weekly contributions to the Central States Southeast and Southwest Areas Pension Fund; weekly contributions to the Ohio Conference of Teamsters & Industry Health & Welfare Fund; wage rates; shift differential; overtime payments in excess of 8 hours per day; vacation pay; work schedule; call outs or unscheduled overtime outside of the regular or established shifts; seniority provisions; safety equipment and protective clothing; and definition and assignment work.[27]

C. Stein threatened employees and unlawfully assisted or supported IUOE Local 18.

An employer violates Section 8(a)(1) of the Act if it threatens or coerces employees with adverse actions if they fail to join or agree to pay dues to a union that does not represent an uncoerced majority of the unit employees. See *Emerald Green Building Services, LLC*, 364 NLRB No. 109 (2016); and *Brown Transport Corp.*, 239 NLRB 711 (1978). An employer also violates Section 8(a)(2) of the Act when it assists or supports a union that does not represent an uncoerced majority of the unit employees by telling employees they will be represented by that union, distributing membership applications and dues check

[26] In the traditional *Burns* successor case, the remedy is to order the employer to recognize the union and bargain, upon request, over the unit employees' terms and conditions of employment. If after the union has demanded recognition/requested bargaining, the employer changes terms and conditions of employment without first notifying the union and giving it an opportunity to bargain, the remedy also would require the employer to rescind those unilateral changes and restore the status quo.

[27] As previously stated, it was Stein's unlawful unilateral changes to the definition and assignment of work that resulted in employees being assigned to perform cross-jurisdictional work. Respondents, therefore, cannot rely upon the results of Stein's unlawful actions as evidence that the historical units are no longer appropriate. *Dodge of Naperville*, supra at 2253–2254.

authorization cards and telling employees to complete and submit them as a condition of employment, and by allowing that union to come to the employer's property to tell employees that they need to become members. See *Emerald Green Building Services*, supra. *Brown Transport Corp*., supra. Based on the unrefuted evidence, I find that Respondent, through Jason Westover violated Section 8(a)(1) and (2) of the Act, when he unlawful assisted IUOE Local 18 on around January 3 and in mid-February by distributing membership applications and check off authorizations on behalf of Local 18 to employees in the drivers unit and advised them to complete and submit those documents. I also find that Westover violated Section 8(a)(1) of the Act, when he threatened employees in early January and mid-February, that they would be removed from the work schedule if they did not complete and submit the membership application and check off authorization on behalf of Local 18. Similarly, I find based on the unrefuted evidence that Jeff Porter violated Section 8(a)(1) of the Act when he threatened employees in about mid-February or early March, that they would be removed from the work schedule if they did not complete and submit the membership application and check off authorization on behalf of Local 18.

D. IUOE Local 18 threatened employees and received unlawful assistance and support.

A union violates Section 8(b)(1)(A) of the Act if it threatens an employee with job loss in order to coerce him or her to join the union. See *Communication Workers Local 1101 (New York Telephone)*, 281 NLRB 413, 417 (1986); and *Laborers Local 806*, 295 NLRB 941 fn. 2 (1989), enfd. mem.974 F.2d 1343 (9th Cir. 1992). As stated, I find that IUOE Local 18, through Justin Gabbard and Richard E. Dalton, separately threatened Gary Wise that he would be taken off the schedule if he did not join Local 18, in violation of Section 8(b)(1)(A) of the Act.

It is a violation of Section 8(b)(1)(A) of the Act for a union which lacks majority support among the unit employees to be allowed to distribute membership applications and dues-checkoff authorization cards to those employees. *North Hills Office Services*, 342 NLRB 437, 445 (2004). As stated, I find that Stein allowed Gabbard on the jobsite multiple times to distribute permit packets, and distributed packets for him, in violation of Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

1. Stein, Inc. (Stein) is a contractor performing the scrap reclamation, slag removal, and processing of slag ("slag/scrap work") for AK Steel at its Middletown, Ohio location, and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Operating Engineers (IUOE) Local 18 (IUOE Local 18) and Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters (Teamsters Local 100) are labor organizations within the meaning of Section 2(5) of the Act.

3. The following unit of employees (hereinafter "drivers unit") is appropriate within the meaning of Section 9(b) of the Act:

> All truck drivers employed by [Stein] at its AK Steel, Middletown, Ohio facility, excluding all other production and maintenance employees, office clerical employees, professional employees, guards and supervisors as defined by the Act.

4. Teamsters Local 100 is and, at all material times, has been the recognized collective-bargaining representative of the drivers unit within the meaning of Section 9(a) of the Act.

5. Since January 1, 2018, Stein has been the successor employer to TMS International, Inc. (TMS) when it assumed the contract to perform the slag/scrap work for AK Steel at its Middletown, Ohio location

and continued to perform that work in basically unchanged form, employing as a majority of its employees individuals who were previously employees of TMS, including a majority of the employees in the drivers unit.

6. The most recent collective-bargaining agreement covering the terms and conditions of employment for the drivers unit is dated April 1, 2016 to December 31, 2017 (hereinafter referred to as "Teamsters Local 100 collective-bargaining agreement").

7. Stein violated Section 8(a)(1) of the Act when it informed all potential applicants from TMS, including from the drivers unit, that all jobs related the performance of the slag/scrap work would be under IUOE Local 18.

8. Stein violated Section 8(a)(2) and (1) of the Act since about October 12, 2017, when it recognized IUOE Local 18 as the exclusive collective-bargaining representative of the employees in the drivers unit, and on December 22, 2017, when it entered into a collective-bargaining agreement with IUOE Local 18, and since January 1, 2018, when it began maintaining and enforcing the terms of that agreement, including the union-security and dues-checkoff provisions, on employees in the drivers unit, at a time when Local 18 did not represent an unassisted and uncoerced majority of the employees in that unit, and those employees were represented for collective-bargaining purposes by Teamsters Local 100.

9 (a) Stein forfeited its right to set initial terms and conditions of employment for the employees in the drivers unit by the unfair labor practices described above in paragraphs 7 and 8, and, therefore violated Section 8(a)(5) and (1) of the Act since January 1 when it began applying the terms and conditions of the collective-bargaining agreement referred to in paragraph 8 on the drivers unit; and

(b) by unilaterally changing the existing terms and conditions of employment, contained in the collective-bargaining agreement referred to above in paragraph 6, including: weekly contributions to the Central States Southeast and Southwest Areas Pension Fund; weekly contributions to the Ohio Conference of Teamsters & Industry Health & Welfare Fund; wage rates; shift differential; overtime payments in excess of 8 hours per day; vacation pay; work schedule; call outs or unscheduled overtime outside of the regular or established shifts; seniority provisions; safety equipment and protective clothing; and the definition and assignment work.

10. Stein violated Section 8(a)(3) and (1) of the Act by maintaining and enforcing the union-security and dues-checkoff provisions referred to above in paragraph 8 on employees in the drivers unit, when Local 18 did not represent an unassisted and uncoerced majority of the employees in the drivers unit.

11. Stein violated Section 8(a)(5) and (1) of Act since January 1, 2018, and/or at least January 10, 2018, when it failed and refused Teamsters Local 100's requests for recognition and bargaining as the 9(a) bargaining representative of the drivers unit.

12. Stein violated Section 8(a)(2) and (1) of the Act by granting assistance and support to IUOE Local 18 by allowing access to the jobsite to distribute, and assisting in the distribution of, membership applications and dues-checkoff authorizations to employees in the drivers unit; and violated Section 8(a)(1) of the Act by threatening or otherwise coercing employees in the drivers unit to join and pay dues and fees to IUOE Local 18, when IUOE Local 18 did not represent an unassisted and uncoerced majority of the employees in that unit.

13. IUOE Local 18 violated Section 8(b)(1)(A) and (2) of the Act by accepting recognition from Stein as the exclusive bargaining representative of the employees in the drivers unit, by entering into, maintaining, and enforcing the terms of the collective-bargaining agreement referred to above in paragraph

8, and by receiving dues and fees from the employees in the drivers unit, when IUOE Local 18 did not represent an unassisted and uncoerced majority of the employees in the drivers unit.

14. IUOE Local 18 violated Section 8(b)(1)(A) of the Act when its agents threatened employees in the drivers unit that they would be taken off the schedule if they did not join and pay fees and dues to Local 18, when IUOE Local 18 did not represent an unassisted and uncoerced majority of the employees in the drivers unit.

15. IUOE Local 18 violated Section 8(b)(1)(A) of the Act by receiving assistance and support from Stein by being allowed on the jobsite to distribute membership applications and dues-checkoff authorization cards to employees in the drivers unit.

16. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Stein and IUOE Local 18 have engaged in certain unfair labor practices, I shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Stein is ordered to withdraw recognition from IUOE Local 18 as the collective-bargaining representative of the employees in the drivers unit and cease and desist applying the contract between Stein and IUOE Local 18, including, but not limited to, the union-security and dues-checkoff provisions, to the employees in the drivers unit, when IUOE Local 18 did not represent an unassisted and uncoerced majority of the employees in that unit Likewise, IUOE Local 18 is ordered to cease accepting Stein's recognition as the representative of the employees in the drivers unit, when IUOE Local 18 does not represent an unassisted and uncoerced majority of the employees in that unit.

Stein also is ordered to recognize and bargain with Teamsters Local 100 as the exclusive bargaining representative of the employees in the drivers unit with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document. Additionally, Stein shall, upon request of Teamsters Local 100, rescind any departure from the terms and conditions of employment that existed before January 1, 2018, and retroactively restore preexisting terms and conditions of employment, including: weekly contributions to the Central States Southeast and Southwest Areas Pension Fund, weekly contributions to the Ohio Conference of Teamsters & Industry Health & Welfare Fund, wage rates, shift differentials, overtime payments in excess of 8 hours per day, vacation pay, work schedules, call outs or unscheduled overtime outside of the regular or established shifts, seniority provisions, safety equipment and protective clothing, and definition and assignment work, until Stein negotiates in good faith with Teamsters Local 100 to an agreement or to impasse. Backpay shall be computed as in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.3d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Stein shall compensate affected employees for adverse tax consequences, if any, of receiving a lump-sum backpay award, in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). In addition, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Stein shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, submit and file with the Regional Director for Region 9 a report allocating the backpay award to the appropriate calendar year. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The remedial order also includes paying any additional amounts due to the above-referenced funds as a result of the above violations, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and *Smoke House Restaurants, Inc*., 365 NLRB No. 166 (2017).

Further, Stein and IUOE Local 18 shall be jointly and severally liable for reimbursing all claims by present and former employees of the drivers unit who joined IUOE Local 18 on or since January 1, 2018, for any initiation fees, periodic dues, assessments, or any other monies they may have paid or that may have been withheld from their pay pursuant to the collective-bargaining agreement between Stein and IUOE Local 18, together with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Stein and IUOE Local 18 shall post the Board's standard Notice to Employees and Notice to Employees and Members in Appendix A and B, respectively. I decline the General Counsel's request in the amended consolidated complaint that, as part of the remedial order, the Notices be read to employees/members. I note that the Board has held that in determining whether additional remedies are necessary to fully dissipate the coercive effect of unfair labor practices, it has broad discretion to fashion a remedy to fit the circumstances of each case. *Casino San Pablo*, 361 NLRB 1350, 1355–1356 (2014); *Excel Case Ready*, 334 NLRB 4, 4–5 (2001). The Notice reading remedy is atypical and generally ordered in situations when there is a showing that the Board's traditional notice remedies are insufficient, such as when a respondent is a recidivist violator of the Act, when unfair labor practices are multiple and pervasive, or when circumstances exist that suggest employees will not understand or will not be appropriately informed by a notice posting. The General Counsel does not address the basis for this additional remedy in his posthearing brief. And while I find that Stein and IUOE Local 18 committed serious violations, as reflected in my forfeiture remedy, I find there is no evidence of recidivism, pervasive violations, or that employees will not be appropriately informed by a traditional notice posting.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[28]

ORDER

A. Stein, and its officers, agents, successors, and assigns, shall do the following

1. Cease and desist from

(a) Failing or refusing to recognize and bargain, on request, with Teamsters Local 100 as the exclusive collective-bargaining representative of the employees in the drivers unit concerning wages, hours, and other terms and conditions of employment.

(b) Granting assistance or support to IUOE Local 18, including recognizing it as the exclusive collective-bargaining representative of the employees in the drivers unit, at a time when IUOE Local 18 does not represent an unassisted and uncoerced majority of the employees in that unit, and Teamsters Local 100 was the exclusive collective-bargaining representative of the employees in that unit.

(c) Applying the terms and conditions of employment of the collective-bargaining agreement with IUOE Local 18, including its union-security and dues check-off provisions, to the employees in the

[28] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

driver unit, at a time when IUOE Local 18 did not represent an unassisted and uncoerced majority of the employees in that unit.

(d) Failing to continue the terms and conditions of employment for the employees in the drivers unit in effect prior to January 1, 2018, until Stein negotiates in good faith with Teamsters Local 100 to an agreement or to impasse.

(e) Unilaterally changing wages, hours, or other terms and conditions of employment applicable to employees in the drivers unit, without providing Teamsters Local 100 with prior notice and an opportunity to bargain over the changes.

(f) Interfering with, restraining, or coercing employees in the exercise of their Section 7 rights, by making threats or other statements that they will be represented by IUOE Local 18 and threatening them with job loss if they do not join and pay dues and fees to IUOE Local 18.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw recognition from IUOE Local 18 as the exclusive collective-bargaining representative of the employees in the drivers unit.

(b) Refrain from applying the terms and conditions of employment of the collective-bargaining agreement between Stein and IUOE Local 18, including its union-security and dues-checkoff provisions, to the employees in the drivers unit.

(c) Jointly and severally with IUOE Local 18, reimburse all employees in the drivers unit for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the collective-bargaining agreement between Stein and IUOE Local 18, with interest.

(d) Notify Teamsters Local 100, in writing, of all changes made or effective on or after January 1, 2018 to the terms and conditions of employment for those in the drivers unit and, upon request of Teamsters Local 100, rescind any or all unilaterally imposed changes and restore terms and conditions of employment retroactively to January 1, 2018.

(e) Make employees in the drivers unit and the funds whole for any losses sustained due to the unlawfully imposed changes in their terms and conditions of employment in the manner set forth above in the remedy section.

(f) Compensate the employees in the drivers unit for any adverse income tax consequences of receiving their backpay in one lump sum, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at the AK Steel Middletown, Ohio location copies of the attached notice marked "Appendix A."[29] Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Stein's authorized representative, shall be posted by Stein and maintained for 60 consecutive days in conspicuous places throughout the AK Steel Middletown, Ohio location, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Stein customarily communicates with its employees by such means. Reasonable steps shall be taken by Stein to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Stein has closed certain facilities involved in these proceedings, Stein shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Stein at the AK Steel Middletown, Ohio location, at any time since October 12, 2017.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Stein has taken to comply.

B. IUOE Local 18, its officers, agents and representatives, shall

1. Cease and desist from

(a) Accepting assistance or support from Stein, including recognition as the exclusive collective-bargaining representative of the employees in the drivers unit at a time when IUOE Local 18 does not represent an uncoerced or unassisted majority of the employees in that unit, and at a time when Teamsters Local 100 was the exclusive collective-bargaining representative of the employees in that unit.

(b) Maintaining and enforcing its collective-bargaining agreement with Stein, including its union-security and dues-check-off provisions, to apply to employees in the drivers unit.

(c) Threatening employees in the drivers unit to join and pay dues and fees to IUOE Local 18 when it does not represent an unassisted and uncoerced majority of the employees in that unit.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Decline recognition as the exclusive collective-bargaining representative of the employees in the drivers unit.

(b) Jointly and severally with Stein reimburse all present and former employees from the driver unit for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the collective-bargaining agreement between Stein and Local 18, with interest.

(c) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its headquarters and at its offices and meeting halls, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by IUOE Local 18's authorized representative, shall be posted by IUOE Local 18 and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the IUOE Local 18 customarily communicates with its members by such means. Reasonable steps shall be taken by the IUOE Local 18 to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 9, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the IUOE Local 18 has taken to comply.

Dated, Washington, D.C., January 24, 2019.

ANDREW S. GOLLIN
ADMINISTRATIVE LAW JUDGE

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail or refuse to recognize and bargain with Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters ("Teamsters Local 100") as the Section 9(a) collective-bargaining representative of the employees the following appropriate unit:

> All truck drivers employed by [Stein] at its AK Steel, Middletown, Ohio facility, excluding all other production and maintenance employees, office clerical employees, professional employees, guards and supervisors as defined by the Act.

WE WILL NOT recognize and provide assistance or support to the International Union of Operating Engineers (IUOE) Local 18 ("IUOE Local 18") as the exclusive collective-bargaining representative of the employees in the above unit, at a time when IUOE Local 18 does not represent an unassisted and uncoerced majority of the employees in that unit, and Teamsters Local 100 is the exclusive collective-bargaining representative of the employees in that unit.

WE WILL NOT apply the terms and conditions of employment of the collective-bargaining agreement with Stein, Inc., including its union-security and dues-checkoff provisions, to the employees in the above unit, at a time when IUOE Local 18 does not represent an unassisted and uncoerced majority of the employees in that unit.

WE WILL NOT fail to continue the terms and conditions of employment for the employees in the above unit in effect prior to January 1, 2018, until we negotiate in good faith with Teamsters Local 100 to an agreement or to impasse.

WE WILL NOT unilaterally change wages, hours, or other terms and conditions of employment applicable to employees in the above unit, without providing Teamsters Local 100 with prior notice and an opportunity to bargain over the changes.

WE WILL NOT interfere with, restrain, or coerce employees in the above unit regarding the exercise of their Section 7 rights, including threatening or otherwise coercing them to join and pay dues and fees to IUOE Local 18 or tell them that all jobs will be under IUOE Local 18.

WE WILL NOT any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL withdraw recognition from IUOE Local 18 as the bargaining representative of the employees in the above unit.

WE WILL refrain from applying the terms and conditions of the collective-bargaining agreement between Stein and IUOE Local 18, including the union-security and dues-checkoff provisions, to the employees in the above unit, at a time when IUOE Local 18 does not represent an unassisted and uncoerced majority of the employees in that unit, and Teamsters Local 100 is the exclusive collective-bargaining representative of the employees in that unit

WE WILL, jointly and severally with IUOE Local 18, reimburse all employees in the above unit for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the agreement between Stein and IUOE Local 18, with interest.

WE WILL notify Teamsters Local 100, in writing, of all changes to the wages, hours, and other terms and conditions of employment for those in the above unit made or in effect on and after January 1, 2018, and, upon request by Teamsters Local 100, rescind any or all unilaterally imposed changes to wages, hours or other terms and conditions of employment, and restore retroactively the terms and conditions that existed before January 1, 2018.

WE WILL make those employees in the above unit and the funds whole for any losses to their wages or benefits sustained due to the unlawfully imposed changes in wages, hours, and other terms and conditions of employment.

WE WILL compensate the employees in the above unit for any adverse income tax consequences of receiving their backpay in one lump sum, and file with the Regional Director for Region 9 a report allocating the backpay award to the appropriate calendar year(s).

STEIN, INC.
(Employer)

DATED: _____ BY_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

John Weld Peck Federal Building, 550 Main Street, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-214633 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACE, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 513-684-3733.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT accept recognition from Stein, Inc. as the exclusive collective-bargaining representative of the employees in the following unit, at a time when we do not represent an uncoerced majority of the employees in the unit, and when Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters (Teamsters Local 100) is the exclusive collective-bargaining representative of those employees:

> All truck drivers employed by [Stein] at its AK Steel, Middletown, Ohio facility, excluding all other production and maintenance employees, office clerical employees, professional employees, guards and supervisors as defined by the Act.

WE WILL NOT maintain or enforce our collective-bargaining agreement with Stein, including its union-security and dues-checkoff provisions, to apply the employees in the above unit.

WE WILL NOT accept assistance or support from Stein, Inc. as the exclusive collective-bargaining representative of the employees in the above unit.

WE WILL NOT restrain or coerce you in the exercise of your rights guaranteed by Section 7 of the Act by threatening employees from the above unit with adverse consequences if they refuse to join the International Union of Operating Engineers (IUOE) Local 18 (Local 18).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL decline recognition as the exclusive collective-bargaining representative of Stein's employees in the unit described above.

WE WILL, jointly and severally with Stein, Inc., reimburse all present and former employees in the unit described above for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the collective-bargaining agreement between Stein and IUOE Local 18, with interest.

THE INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE) LOCAL 18
(Union)

DATED: _____ BY_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

John Weld Peck Federal Building, 550 Main Street, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CB-214595 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

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